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NO: 84-1109

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

HANS BOTHKE, Petitioner

v.

ERNEST L. RACCA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO THE RESPONDENT'S OPPOSITION

(Pursuant to Rule 22.5 of this Court)

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(Pursuant to Rule 22.5 of this Court)

The respondent's memorandum in opposition to the petition for a writ of certiorari misstates the facts and law in the record, is contradictory,raises first time arguments, and necessitates this reply.

On page one of respondent's memorandum, the respondent asserts based on the appeal

court's ruling that Racca was entitled to qualified immunity for his action filing a notice of federal tax lien against Bothke's property. The respondent thereby conveniently ignored and mistated the facts in the record which show that the filing of the lien was undertaken knowingly and willfully by Racca during an audit requested by the IRS when in fact warned by Bothke of the ongoing audit.(App.I,page 18a to 21a and App.J,page 22a of the petition). Accordingly it was not the IRS filing the lien as falsely alleged by the respondent,but it was Racca who thereby waived his immunity defense which is afforded only by following proper IRS agency adjudication process,"Audit" and"Deficiency procedure",Stankevitz v.IRS,640 F 2d 205 and Davis v.US,47 AFTR 2d 81-454,which Racca totally and knowingly ignored.

The respondent also raised for the first time the argument that Bothke's claimed deductions are not cognizable under the Internal Revenue Code. This argument is totally

irrelevant to the set forth issues in this case,and if even for argument sake accepted as true,this allegation does not authorize Racca to violate established due process rights of Bothke and precise presrcibed revenue procedures as set forth under Section 6211,6212,6213,6321,6322 and 6331.[1]

Bothke will graciously set forth a rebuttal to this illfounded argument with the well established facts by Courts that "where the Code is silent the common law governs." Cole v.Rush,289 P 2d 450,45 C 2d 345,54 ALR 2d 1137;Victory Oil Co.v.Hancock Oil Co, (1954) 125 CA 2d 222,270 P 2d 604,hear.den; US v.Gervato,340 F Supp 454,vac.474 F 2d 40, cert,den.94 S Ct.39,414 US 864,38 L Ed 2d 84.

An examination of the common law demonstrates that the respondent's alleged support for the production of income is well recognized in Redfield v.Fisher,S.Ct.Oregon,292 P 813 stating: "The individual,unlike the corporation,cannot be taxed for the mere pri-

[1] (App.E,F,page 12a to 15a,pet.)

vilege of existing***and the individuals rights to live are natural rights;Upheld also by the US Supreme Court in Adams v, Tanner,244 US 590 stating: "You take my life when you do take the means whereby I live."

It must be recognized that unpublished opinions of Court of Appeals,as in this case, do not become part of the common law.State v.Fitzpatrick,491 P 2d 262,5 Wash.App.661.

In view of respondent's raised first time argument,he raised an additional dispute subject to proposed taxes and deficiency provisions under Section 6212 and 6213 26 USCA, wholly untenable under respondent's set forth contention of a mere mathematical error under Section 6213(b)(1) as established in Muse v.Enochs,164 F Supp 561,aff'd in Enochs v.Muse,270 F 2d 528.

The set forth allegation throughout his memorandum by respondent,that Bothke was informed of a tax deficiency assessed against him by the IRS is clearly preposterous,when in fact the IRS initiated proper

agency adjudication proceeding by audit,(App. J.,page 22a,petition) during which Racca knowingly filed the tax lien on Bothke's property(App.K,page 23a,pet.) in violation of the herein above set forth revenue law.

If in fact a deficiency assessment would have existed as claimed by respondent,why would the IRS initiate audit proceedings subsequent an established deficiency assessment? In view of the above set forth facts the respondent's statements are false,blatent, ruthless,and without credibility.

An additional set forth lie by the respondent on page one,that a notice of correction of mathematical error was sent to Bothke pursuant to Section 6213(b)(1) is readily recognized by the fact that said notice (App.G,page 16a and 17a,pet.) does not indicate any statutory authority,but only invites a respond which Bothke had sent promptly,requesting a notice of deficiency (App.H,page 17a and 18a,pet.) which was not existing.

The set forth contention by the respondent that the tax lien filed by Racca did not effect a seizure, is also preposterous when in fact such lien is officially recorded with the County Recorder, draws interest and penalties, and restricts sale and transfer of property.

The courts have also established that levying and seizing property by low level IRS agents like Racca, constitutes a "ministerial" activity, Mark v.Groff, 521 F 2d at 1380-81 and CF G.M. Leasing v.US, 560 F 2d at 1014 cited in Bothke v.Fluor and Terry, 713 F 2d at 1413, and not as falsely set forth by the respondent to be a discretionary activity which is subject to qualified immunity defense.

In light of the fact that "ignorance of the law is no excuse" 50-80, 16 Op.Atty.Gen.57, and "law should not tolerate even a small injustice nor the appearance of it", Hughes v.Gengler, 404 F 2d 229, cert.den.89 S.Ct.870, 393 US 1085, 21 L Ed 2d 778,

IT is respectfully submitted that the petition for a writ of certiorari should be granted, on the grounds set forth in Bothke v. Fluor and Terry, supra, cert. granted 83-1506, and Davis v. Scherer, 104 S.Ct. 2404, 76 L Ed 2d 648 (1983).

Dated: April 22, 1985.

Hans Bothke
petitioner in pro per.